In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1445

JOHN J. McDONOUGH, ET AL.,
PETITIONERS

v.

TALLULAH MORGAN, ET AL.,
MASSACHUSETTS BOARD OF EDUCATION, ET AL.,
RESPONDENTS

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Brief of Respondents Massachusetts Board of Education, et al., in Opposition to Certiorari

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The respondents Board of Education and Commissioner of Education of Massachusetts (hereafter referred to collectively as the Board of Education) file this brief in opposition to the petition for certiorari of the Boston School Committee and Superintendent (hereafter referred to collectively as the Committee). The Board of Education is the state agency with

general superintendence over the Committee. Under state law, the Board is mandated to see that the Committee complies with federal constitutional guarantees as well as with state laws. Mass. Gen. Laws c. 15, § 1G. The Board believes that the orders of the district court are necessary to enforce the United States Constitution.

At the original trial on issues of liability, the district court found that the Board, a defendant, had not violated plaintiffs' constitutional rights. *Morgan* v. *Hennigan*, 379 F. Supp. 410, 476-77 (D. Mass. 1974). Nevertheless, the court retained the Board as a party in the case to participate in the framing of remedies. The remedial orders of the district court, formulated with the Board's assistance, are the subject of the Committee's petition.

Question Presented

Whether the United States Court of Appeals for the First Circuit erred in holding that the desegregation plan adopted by the district court was a proper exercise of its equitable powers.

Statement of the Case

The Committee asks this Court to review the judgment of the Court of Appeals for the First Circuit affirming an order of the District Court for the District of Massachusetts which established and ordered implemented a systemwide desegrega-

tion plan for the Boston public schools. The opinions and orders below are contained in the Appendix to the Petition.

On June 21, 1974, the district court held that the entire Boston public school system was unconstitutionally segregated. *Morgan* v. *Hennigan*, 379 F. Supp. 410 (D. Mass. 1974). This finding was affirmed on appeal, *Morgan* v. *Kerrigan*, 509 F. 2d 580 (1st Cir. 1974), and this Court denied review, 421 U.S. 963 (1975). Prior to establishing a systemwide desegregation plan, the district court ordered the Committee, as interim relief for the academic year 1974-1975, to comply with a racial balance plan imposed under state law by the Massachusetts Supreme Judicial Court.[1] *Morgan* v. *Hennigan*, 379 F. Supp. at 483-84; A. 63. Because the state racial balance plan was inadequate as a systemwide desegregation plan (A. 63), the district court established guidelines for drafting a systemwide plan and ordered the Committee to file such a plan by December 16, 1974 (A. 65).

The Committee openly resisted the orders of the court to develop a desegregation plan.[2] On December 16, 1974, a majority of the Committee members refused to file a plan prepared by Boston School Department staff and did not file any other plan in its place (A. 66). At that point, counsel for the Committee filed the staff plan and sought leave to withdraw

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[1] The Committee requested and was granted time from the court to develop alternatives to this state plan. The Committee subsequently refused to approve any of the alternatives developed by its staff (A. 72), and the state plan went into effect.

[2] The district court also found a history of noncompliance by the Committee with past racial balance orders of the Supreme Judicial Court and directives from the Board of Education. *Morgan* v. *Hennigan*, 379 F. Supp. at 418-420, 476-77; A. 62.

from the case. The Committee members were thereafter held in civil contempt, and at the contempt hearings they each stated under oath that they would take no action on their own to bring about desegregation but would take only those steps directly ordered by the court (A. 66-67). One member stated that he would never vote for a plan that included "forced busing" of students although he knew it was impossible to accomplish desegregation without it (A. 67). On January 27, 1975, the Committee filed a plan that omitted mandatory busing and relied exclusively on freedom of choice and part-time resource centers, despite past experience in Boston establishing that these measures would not accomplish desegregation (A. 70-73).

On May 10, 1975, the district court issued its own system-wide desegregation plan. The plan represents a modification of a plan recommended by court-appointed masters, who had held hearings on plans submitted by the parties, and had incorporated many elements of these submissions in their plan. The court's plan divides the city into a number of geographical community school districts and a citywide system of magnet schools, as had the Committee's plan (A. 85-87). In a school system that is 51 percent white (A. 81), the community districts created by the court range from 40 percent white to 95 percent white (A. 127-57). Individual schools within community districts are permitted to vary $\pm$ 25 percent of the racial composition of the district (A. 180).[3] The magnet schools, which draw their students from the entire city, range from 56 to 46 percent white (A. 181). Students may choose either to attend a particular citywide magnet school or to stay in their own community school districts (A. 179). No student

[3] For instance, in a district that is 40 percent white, individual schools may range from 30 to 50 percent white, because 25 percent of 40 = 10 percent.

who chooses his community school district is transported outside of that district (A. 179). The plan mandates the busing of approximately 21,000 students, compared with 17,000 under the interim state racial balance plan, and 30,000 who were bused or used public transportation prior to desegregation (A. 92, 185). The average distance travelled is 2.5 miles; the longest is 5 miles (A. 184). Travel time averages between 10 and 15 minutes each way; the longest trip is less than 25 minutes (A. 184).

The plan has two other major components: community involvement and university pairings. Multi-racial parent/community organizations were created for each school and at the community district and citywide levels to assist the court in monitoring implementation of the desegregation plan. The plan prohibits these organizations from assuming any of the powers or responsibilities of the Committee (A. 188).

The plan also pairs a number of Boston public schools with local colleges and universities, businesses and labor organizations, or cultural institutions (A. 163-69). The purposes of the pairings include assisting with the development of the magnet programs, remedying the educational consequences of segregation, equalizing educational resources within the system, and monitoring the plan. The plan requires the Committee to use its best efforts to negotiate contracts with these outside agencies, whose participation is wholly voluntary (A. 164). The plan expressly disclaims any intent that these agencies usurp Committee responsibilities (A. 163). The costs of the planning and programs resulting from these pairings are almost entirely paid by the Board of Education, pursuant to Mass. Gen. Laws c. 71, §§ 37I and 37J (A. 49, 107).

It is this desegregation plan that the Committee petitions this Court to review.

Reasons for Denying Writ

I. Introduction.

The Committee's petition should be denied because it does not present any of the considerations that customarily lead this Court to grant review. The petition does not raise any issue on which courts of appeals are in conflict or any important question of federal law that is unresolved by this Court. The decisions below are fully consonant with the applicable rulings of this Court and are plainly proper. The Committee, in essence, seeks one more chance to make arguments considered and rejected by the courts below. Further, the issues raised by the Committee do not have general application, but rather turn on the specific facts of this case, and therefore would provide no foreseeable guidance for the disposition of future cases. The process of desegregation required by the Constitution is now underway, and, despite official resistance, desegregated education is now the reality as well as the rule in Boston. The growing sense of finality about the existence of desegregated schools would be ill-served by further unnecessary review.

The Committee's main contention, that the district court has impermissibly intruded upon questions of educational quality unrelated to desegregation, rests on an oversimplified and mistaken characterization of the district court's desegregation plan and orders. It also ignores the fact that both the court of appeals and the district court carefully and specifically distinguished between those educational issues reserved to the

Committee and desegregation issues appropriate for the courts (A. 103-04, 50, 51, 74). As the district court stated, at A. 74:

> Nor does the plan reflect any imagined independent constitutional power of the court to decide that educational policies are desirable for the public school system of the City of Boston. Education is a matter entrusted initially to elected local authorities and appointed state authorities. Even after unlawful segregation has been found, responsibility falls initially upon the local school authorities to remedy the effects of this segregation. *Brown* v. *Board of Education*, 1955, 349 U.S. 294, 299 . . . *Swann*, *supra*, 402 U.S. at 16. Only the default of the school committee in this case has obliged the court to employ the help of the appointed experts and masters and to draw an adequate plan.

The Committee's arguments, upon analysis, reduce to the plainly untenable contention that a federal court's desegregation plan may redistribute students and do nothing else. The Committee's contention would prevent desegregation courts from taking steps to secure effective and stable desegregation, eradicate the educational consequences of segregation, and equalize the distribution of resources in the system.

II. The District Court Properly Exercised Its Equitable Powers In Accordance With This Court's Rulings.

In the first instance, the affirmative duty to devise and implement a desegregation plan falls on the school committee that has violated the Fourteenth Amendment. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16

(1971). If a school committee defaults in meeting these obligations, the district court must formulate an effective desegregation plan. *Id.* This Court has thus recognized a difference between a school committee that affirmatively grasps its constitutional obligations and one, as the Committee here, that defaults, thereby causing the burden of accomplishing desegregation to fall on the district court.

In *Hills* v. *Gautreaux*, 44 U.S.L.W. 4480, 4484 (U.S. April 20, 1976), this Court held:

> [I]n the event of a constitutional violation "all reasonable methods [should] be available to formulate an effective remedy," *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 46, and . . . every effort should be made by a federal court to employ those methods "to achieve the greatest possible degree of [relief], taking into account the practicalities of the situation." *Davis* v. *Board of School Comm'rs*, 402 U.S. 33, 37.

The orders to which the Committee here objects are not excursions into educational policy making. Rather they are practical mechanisms, carefully devised to see to it that desegregation is effective in light of the failure of local officials to take the preferable course of devising and implementing a plan themselves. The actions, and inaction, of the local officials here emphasized the need for the district court to use its equitable powers broadly and flexibly to insure effective desegregation. *Green* v. *School Board of New Kent County*, 391 U.S. 430 (1968). Although this Court has stated that remedies for segregation may be "administratively awkward, inconvenient, and even bizarre," *Swann*, 402 U.S. at 28, the desegregation plan at issue contains none of these features. Each of the

orders objected to by the Committee has at least one, and often several desegregative functions.

1. *University Pairings.*

The orders on university pairings and certain related program offerings are designed to make the heart of the court's plan — the magnet school system — function effectively. It is noteworthy that this voluntary desegregation device was originally proposed by the Committee (A. 70). There were, however, no assurances under the Committee plan that these schools would be desegregated — particularly in light of the historic ineffectiveness of such devices in Boston (A. 71) — or that the Committee, without assistance, could have had such schools ready for the 1975-1976 school year (A. 12). The involvement of area universities through the system of pairings increased the attractiveness of the magnet schools and increased the likelihood of their success.[4]

The court of appeals has made the most compelling response to the Committee's contention that school pairing impermissibly intrudes on issues of educational quality (A. 49):

> This argument — that the court has no legitimate function to improve quality — entirely misses the point that if magnet schools are to act as lodestones, drawing students voluntarily . . . quality is a key to this aspect of a plan of desegregation. And the court had been led in the clearest terms to understand that the Committee would do only what it was ordered to do. Reliance on the Committee to create imaginative programs of utility and attractiveness would not only have been ill advised,

[4] Successful magnet schools would, of course, minimize the amount of mandated transportation and be in accordance with Congressional policy. 20 U.S.C. § 1713.

but the supervision of compliance in this area, as opposed to student assignment for example, would have drawn the court into purely educational decisions. Paradoxically, therefore, the resort to outside contracting may have an effect precisely the opposite to that alleged by the appellants.

In some instances, the pairings were with nonmagnet schools. The use of outside institutions helped to insure in all paired schools that instruction was nondiscriminatory, educational services were equalized, and programs to remedy the educational deficiencies of segregation were installed (A. 83, 86, 108).

There is no detriment to the Committee from the pairings, nor was it unusual for the Committee to enter into contracts with universities for assistance (A. 164-65). Massachusetts law encourages the use of magnet schools to remedy racial imbalance, and explicitly contemplates the use of outside public or private facilities. Mass. Gen. Laws c. 71, §§ 37I, 37J. Under this law, the Board of Education is bearing most of the costs of planning and executing programs resulting from the pairings (A. 49, 107). Finally, the court limited itself to ordering the Committee to negotiate in good faith with the paired institutions toward the end of entering into mutually acceptable contracts (A. 164). It did not require the Committee to make contracts nor were any contract terms dictated by the court (A. 164-65).

2. *Program Offerings.*

The Committee's complaint that the court specified certain courses be given is also without merit. The Committee re-

peatedly defaulted on its obligation to produce a viable desegregation plan (A. 62-63, 70-73); had a history of using voluntary choice mechanisms to produce segregation (A. 12, 71); and refused to do anything to assist desegregation unless ordered (A. 46-47). The vast majority of the courses referred to in the plan (at A. 167-74) simply described the Committee's existing programs or courses. The Committee did not object below to the few instances where the district court deviated from the Committee's proposals, nor did it ever suggest any substitutions to the court (A. 47-48). The court's orders concerning courses were designed to enhance the attractiveness of the magnet schools (A. 48), and were plainly proper.

3. *Other Administrative Measures.*

Other orders objected to by the Committee were designed to assist with implementation and have precedent in other circuits. The order requiring the appointment of district superintendents for each district and a principal or headmaster for each school created no new categories of personnel, and insured that the desegregation plan would be implemented by having a person in charge at each appropriate level (A. 119). The court did not order the hiring of any new personnel, the replacement of any incumbents already in those positions, or the payment of any particular salary (A. 119, 83). The order was a practical step and was entirely consistent with precedent. *Swann*, 402 U.S. at 18-19; *Davis* v. *School District of the City of Pontiac, Inc.*, 487 F. 2d 890 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971); *Plaquemines Parish School Board* v. *United States*, 415 F. 2d 817, 821, n. 2 (5th Cir. 1969).

4. *Court Experts and Community Monitoring.*

The roles given to the court's experts and to the community monitoring groups were integral to successful implementation of the plan and were not unique to this case. It is common for desegregation courts to use experts, *Swann*, 402 U.S. at 8-11; *Hart* v. *Community School Board of Brooklyn*, 383 F. Supp. 699, 764-67 (E.D. N.Y. 1974), *aff'd*, 512 F. 2d 37 (2d Cir. 1975), and to establish community groups to assist with monitoring implementation of a plan. *E.g.*, *Singleton* v. *Jackson Municipal Separate School District*, 426 F. 2d 1364, 1370 (5th Cir. 1970), *cert. denied*, 402 U.S. 944 (1971); *Dowell* v. *Board of Education*, 338 F. Supp. 1256, 1272 (W.D. Okla. 1972), *aff'd*, 465 F. 2d 1012, 1015-16 (10th Cir. 1972), *cert. denied*, 409 U.S. 1041 (1972). The importance and, indeed, the obligation of adequate monitoring of a school committee that has expressly stated it will voluntarily do nothing to further desegregation is obvious. Moreover, it was reasonable for the court to utilize its experts and the various community councils to monitor any discriminatory inequities that may remain in the system, in light of its findings that the Committee had provided less support for racially isolated black schools (A. 29).

The monitoring role of the experts is particularly crucial, given the control of the resistant Boston School Department over the actual student assignments — the key to any desegregation plan. At a late date the Committee failed to comply with court guidelines regarding assignments (A. 53). Further delay would have jeopardized implementation of the plan (A. 54). Under such circumstances, the Court was warranted, through its experts, in closely supervising the School Department. Finally, this issue if now moot; the assignments are long since complete and the plan is in full operation.

5. *Examination Schools.*

The Committee objects to the court's orders on the examination schools as being a further intrusion into the education realm (Pet. 19), but the objection raises no significant issue. The three examination schools — the elite schools in Boston — were found to be unconstitutionally segregated at the trial on liability. The district court ordered, as interim relief, that the entering seventh grade and small additional entering ninth grade glasses at the grade 7-12 examination schools be 35 percent black and minority (A. 162). The Committee was given discretion to select the admissions criteria that would result in achievement of the required percentages (A. 162). At most, the court's order was partial relief, desegregating only one full grade out of six, and was designed to be temporary pending the development of racially neutral criteria and the desegregation of the elementary schools (A. 41). The district court's order is also consonant with the requirements of state law.[5] The examination schools may not be exempted from even partial desegregation on the unsupported assertion that desegregation in these schools will affect educational quality.[6]

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[6] The Committee's objections are even less valid in light of the Memorandum and Orders Modifying Desegregation Plan issued by the district court on May 3, 1976, in which the plan for desegregating the examination schools was modified. *Id.* at 11-15. Candidates must now score at or above the 50th percentile on either of two ranked lists. One list contains scores on the

[5] Regulations promulgated by the Board of Education pursuant to 1971 Mass. Acts & Resolves, c. 622 (effective Sept. 1, 1975), require, at Reg. 8.10, that:

> [S]elective secondary schools, including but not limited to selective academic high schools [and] technical schools, shall admit qualified applicants of . . . racial and ethnic groups in numbers proportionate to the existence of members of such class in the secondary school population of the geographic area served by that school.

III. The Decision Of The Court Of Appeals Is Not In Conflict With The Decisions Of Any Other Circuit Court.

The Committee's argument that the decision of the Court of Appeals for the First Circuit, affirming the district court, is in conflict with a decision of the Court of Appeals for the Tenth Circuit does not withstand analysis. *Keyes* v. *School District No. 1, Denver, Colo.*, 521 F. 2d 465 (10th Cir. 1975), *cert. denied*, 96 S. Ct. 806 (1976), is distinguishable on its facts and is consistent in principle with the First Circuit's decision here. *Keyes* reversed the district court for incorporating an extensive plan for bicultural, bilingual education (the Cardenas Plan) into its desegregation order. The Cardenas Plan was characterized by the Tenth Circuit as being "an overhaul of the system's entire approach to education of minorities" that touched

> virtually every aspect of curriculum planning, methodology and philosophy presently the responsibility of local school authorities. . . . [F]or example, the inclusion of specific courses in the curriculum, adoption and publication of specific educational principles, provision of early childhood education (beginning at age three) and adult education for minorities, and provision of adequate clothing for poor minority school children. 521 F. 2d at 481.

Secondary School Admission Test (SSAT) and the other contains grade point averages. The 50th percentile cut off point has been traditional for admission to the examination schools, *id.* at 12, and both SSAT scores and grade point averages have been used by the Committee in the past. The effect of the new criteria will be to reduce the percentage of black and hispanic students entering the seventh grade class to 26 percent. *Id.* at 13.

In the instant case, the Committee has not been deprived of any power over curriculum planning, methodology, or philosophy. The citizen monitoring groups established by the district court here are specifically prohibited from making policy for Boston schools (A. 188). Paired universities may participate in such educational matters only to the extent agreed upon by the Committee and set forth in their contracts (A. 164). Moreover, unlike the situation in *Keyes*, the orders of the court here are consistent with state law. *Compare* Mass. Gen. Laws c. 71, §§ 37I, 37J, *with Keyes*, 521 F. 2d at 482. Finally, the Tenth Circuit, as did the First Circuit here, recognized that the district court did have the power to order programs for minority students so that they could participate equally in the school system. *Id.* at 482-83. The district court's plan for Boston did not venture outside these accepted boundaries.

IV. The Theories Underlying The Petition Would Unwisely Alter Current Doctrine.

Were the Committee's contentions to be accepted, serious difficulties would ensue in implementing remedies for violations of constitutional guarantees. It is well-established that district courts are not limited to shuffling students to overcome unconstitutional school segregation but are obliged to attend as well to discrimination present in instruction, curriculum and allocation of resources. Nonetheless, the Committee would have this Court limit the district court to the use of busing to achieve desegregation, precluding use of more innovative techniques, such as magnet schools, designed to limit the need for exclusively mandatory measures. It would hamstring desegregation courts by depriving them of the power to make their orders effective. The Committee's claims are contrary to the

established rules of this Court giving district courts the power to deal with practicalities to see that their orders prove effective.

If this case is in any way unique, it is unique in the obdurate resistance of the Committee to any form of real desegregation. Despite findings by the district court, affirmed on appeal, that the Committee defaulted on its constitutional remedial duties, deliberately defied court orders, and followed a course of intransigence and obstructionism (A. 46-47, 65-68, 93), the Committee asks this Court to find that it fulfilled its obligations (Pet 12, 13, 16, 17, 18). The record in this case is plainly otherwise. The Committee's conduct was so blatant that the United States Commission on Civil Rights recommended that the district court consider placing the entire school system into receivership. "Desegregating The Boston Public Schools: A Crisis in Civic Responsibility," United States Commission on Civil Rights (August, 1975). The district court has not followed this recommendation. Rather, faced with an unusually difficult task, it has eliminated segregation "root and branch" with extraordinary patience and sensitivity. The district court, confronted with the "flinty intractable" realities of the complex Boston case, faithfully adhered to the remedial standards established by this Court. *Swann*, 402 U.S. at 6.

Conclusion

For the reasons stated above, the petition for certiorari should be denied.

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